

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MIGUEL GUTIERREZ,

Petitioner,

v.

W.L. MONTGOMERY, Warden,

Respondent.

Case No. CV 16-02309-CJC (DFM)

Report and Recommendation of
United States Magistrate Judge

This Report and Recommendation is submitted to the Honorable Cormac J. Carney, United States District Judge, under 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

BACKGROUND

In 2012, a jury convicted Miguel Gutierrez (“Petitioner”) of first-degree murder and of shooting at an inhabited dwelling. See Dkt. 14, Notice of Lodgment, Lodged Document (“LD”) 1, Clerk’s Transcript (“CT”) 240-42. The jury also found that Petitioner’s offenses were for the benefit of, at the direction of, or in association with a criminal street gang. See id. The trial

1 court sentenced Petitioner to 50 years to life in state prison. See CT 262-67.

2 Petitioner filed a direct appeal to the California Court of Appeal, which
3 upheld his conviction in a reasoned opinion on October 7, 2014. See LD 3.

4 Petitioner then filed a petition for review to the California Supreme Court,
5 which denied review without comment on January 14, 2015. See LD 4-5.

6 On March 29, 2016, Petitioner filed a petition for writ of habeas corpus
7 in the Los Angeles County Superior Court, alleging that evidence of his refusal
8 to speak to deputies violated his right against self-incrimination. See LD 6 at
9 23-30. Petitioner also argued that his constitutional right to effective assistance
10 of counsel was violated by: (1) his trial counsel's failure to object to and
11 otherwise contest testimony regarding Petitioner's post-arrest silence; (2) his
12 trial counsel's failure to object to the trial court's admonition to the jury about
13 that silence; (3) his trial counsel's opening statement; (4) his trial counsel's
14 failure to seek exclusion of Petitioner's prior convictions; (5) his trial counsel's
15 introduction of evidence of Petitioner's time in prison. See id. at 30-36. On
16 May 18, 2016, the trial court denied the petition, finding that Petitioner's issues
17 were raised and denied on direct appeal. See LD 7 (citing In re Dixon, 41 Cal.
18 2d 756 (1953)).

19 On April 5, 2016, Petitioner filed the instant Petition alleging five
20 substantive grounds for relief: (1) references at trial to Petitioner's refusal to
21 speak to the police were improper comments on his invocation of his
22 constitutional privilege against self-incrimination; (2) appellate counsel was
23 ineffective for failing to argue trial counsel's failure to object to testimony
24 regarding Petitioner's refusal to speak to the police; (3) trial counsel was
25 ineffective for failing to secure admission of relevant witness testimony, failing
26 to contest an out-of-court identification made in the absence of Petitioner's
27 counsel, and failing to obtain GPS evidence to establish Petitioner's
28 whereabouts at the time of the crime; (4) newly discovered evidence establishes

Petitioner's innocence; and (5) "cumulative errors."¹ See Dkt. 1, Petition at 5-8.² On June 24, 2016, Petitioner moved for a stay under Rhines, see Dkt. 10, and on August 10, 2016, Respondent filed an opposition to Petitioner's motion, see Dkt. 13.

On July 25, 2016, Petitioner filed a petition for writ of habeas corpus in the California Court of Appeal, alleging that his counsel was constitutionally ineffective at trial and in post-conviction proceedings and that newly discovered evidence exonerated him. See LD 8 at 3-5. On September 22, 2016, the California Court of Appeal denied the petition in a reasoned opinion. See LD 9. On December 7, 2016, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court alleging the same claims but missing several pages, which Petitioner supplemented in a later filing on or around January 17, 2017. See LD 10-11. On February 1, 2017, the California Supreme Court summarily denied the petition with citations to People v. Duvall, 9 Cal. 4th 464, 474 (1995), and In re Swain, 34 Cal. 2d 300, 304 (1949). See LD 12.

On March 10, 2017, this Court denied Petitioner's motion for a Rhines stay as moot based on the state courts' denials of Petitioner's state habeas petitions. See Dkt. 19. Noting that the California Supreme Court denied the petition with citations to Duvall and Swain, the Court contemplated that Respondent would file a motion to dismiss the Petition because those citations

¹ Petitioner alleges as an additional ground that the ineffective assistance of his counsel in post-conviction proceedings is good cause for a stay under Rhines v. Weber, 544 U.S. 269, 277 (2005). See Petition at 6. Petitioner's claim is not cognizable as an independent ground for relief. See 28 U.S.C. § 2254(i) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.").

² All page citations to electronically-filed documents use the CM/ECF pagination.

1 indicated as an initial matter that Petitioner’s claims were not pleaded with
2 sufficient particularity under state law. See id. at 2, 2 n.1. As the Court
3 foresaw, Respondent has in fact filed a motion to dismiss, arguing that
4 Petitioner’s ineffective assistance of counsel and newly discovered evidence
5 claims remain unexhausted because they were not fairly presented to the
6 California Supreme Court. See Dkt. 22. Petitioner did not file an opposition.

7 **II.**

8 **STANDARD OF REVIEW**

9 Under 28 U.S.C. § 2254(b), habeas relief may not be granted unless the
10 petitioner has exhausted the remedies available in the state courts.³ Exhaustion
11 requires that the petitioner’s contentions be “fairly presented” to the state
12 courts and be disposed of on the merits by the highest court of the state. Picard
13 v. Connor, 404 U.S. 270, 275 (1971); see also James v. Borg, 24 F.3d 20, 24
14 (9th Cir. 1994); Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir. 1979). To
15 satisfy the fair presentation requirement, the petitioner must describe in the
16 state-court proceedings both the operative facts and the federal legal theory on
17 which his claim is based. See Duncan v. Henry, 513 U.S. 364, 365-66 (1995);
18 Picard, 404 U.S. at 275-78; Davis v. Silva, 511 F.3d 1005, 1009 (9th Cir. 2008);
19 see also Gray v. Netherland, 518 U.S. 152, 162-63 (1996) (“[F]or purposes of
20 exhausting state remedies, a claim for relief in habeas corpus must include
21 reference to a specific federal constitutional guarantee, as well as a statement of
22 the facts that entitle the petitioner to relief.”). As a matter of comity, a federal
23 court will not entertain a habeas corpus petition unless the petitioner has
24 exhausted the available state judicial remedies on every ground presented in

25 ³ The statute provides two exceptions to this requirement, where “(i)
26 there is an absence of available State corrective process; or (ii) circumstances
27 exist that render such process ineffective to protect the rights of the applicant.”
28 28 U.S.C. § 2254(b)(1)(B). Neither is applicable here.

1 the petition. See Rose v. Lundy, 455 U.S. 509, 518-22 (1982). The petitioner
2 also must demonstrate that he has exhausted all available state remedies. See,
3 e.g., Brown v. Cuyler, 669 F.2d 155, 158 (3d Cir. 1982).

4 Duvall and Swain stand for the proposition that a habeas petition must
5 “both (i) state fully and with particularity the facts on which relief is sought, as
6 well as (ii) include copies of reasonably available documentary evidence
7 supporting the claim, including pertinent portions of trial transcripts and
8 affidavits or declarations.” Duvall, 9 Cal. 4th at 474 (internal citations
9 omitted); see also Swain, 34 Cal. 2d at 304. The Ninth Circuit has held that a
10 denial of a state habeas petition with citations to Duvall and Swain is deemed
11 a facial denial on procedural grounds, leaving state remedies unexhausted but
12 the petition itself curable. See Gaston v. Palmer, 417 F.3d 1030, 1039 (9th Cir.
13 2005) (“In light of its citations to Swain and Duvall, we read the California
14 Supreme Court’s denial of [the petitioner’s] . . . habeas application as, in effect,
15 the grant of a demurrer, i.e., a holding that [the petitioner] had not pled facts
16 with sufficient particularity.”), modified on other grounds, 447 F.3d 1165 (9th
17 Cir. 2006); see also Harris v. California, 500 F.2d 1124, 1128 (9th Cir. 1974)
18 (en banc) (“If the denial of the habeas corpus petition includes a citation of an
19 authority which indicates that the petition was procedurally deficient . . . then
20 the available state remedies have not been exhausted as the California
21 Supreme Court has not been given the required fair opportunity to correct the
22 constitutional violation.”); Kim v. Villalobos, 799 F.2d 1317, 1319 (9th Cir.
23 1986).

24 But the Ninth Circuit has also held that the California Supreme Court’s
25 citation to Swain does not establish per se that a petitioner failed to exhaust his
26 or her claims. See Kim, 799 F.2d at 1319-20 (“The state courts, by denying a
27 writ for lack of particularity when the claims are alleged with as much
28 particularity as is practicable, cannot forever preclude the petitioner from

1 reaching federal court. Such a result would defeat the purposes of section
2 2254.”); Hodge v. Hornung, 49 F. App’x 692 (9th Cir. 2002) (“Fair
3 presentation requires only that the claims be pleaded with as much
4 particularity as is practicable.”). District courts must “independently analyze
5 the petition presented to the California Supreme Court to determine whether
6 [the petitioner] satisfied federal exhaustion requirements and alleged his claims
7 ‘with as much particularity as is practicable.’” Barrera v. Att’y Gen. of
8 California, 473 F. App’x 748, 749 (9th Cir. 2012) (quoting Kim, 799 F.2d at
9 1320); see, e.g., Servin v. Hickman, No. 05-1343, 2006 WL 1550433, at *1
10 (E.D. Cal. May 30, 2006) (finding claims exhausted where, despite citation to
11 Duvall and Swain, the “allegations were sufficient to put the state court on
12 notice of petitioner’s claims”); Kim, 799 F.2d at 1320-21 (holding that
13 allegations are fairly presented if they “reveal the substance of [a petitioner’s]
14 claims” or “raise[] a pure question of law”).

15 III.

16 DISCUSSION

17 Upon review of the Petition, the Court finds that Petitioner has fairly
18 presented his ineffective assistance of counsel and newly discovered evidence
19 claims to the California Supreme Court. Respondent’s motion to dismiss
20 should accordingly be denied.

21 A. Ineffective Assistance of Trial Counsel

22 Petitioner’s petition for habeas corpus to the California Supreme Court
23 pleads his ineffective assistance of trial counsel claim with sufficient
24 particularity to satisfy the federal exhaustion requirements. See Barrera, 473 F.
25 App’x at 749. In his petition to the California Supreme Court, Petitioner
26 explicitly alleged that his trial counsel was constitutionally ineffective under
27 Strickland v. Washington, 466 U.S. 668, 695 (1984), for: (1) failing to secure
28 admission of Kenny Lara’s statements to Petitioner’s investigator, Gary

1 Cooper, that Victor Perez was the shooter, not Petitioner, see LD 10 at 15; (2)
2 failing to seek suppression of Chaennette Lozano's testimony, which stemmed
3 from police coercion, see id. at 17; (3) failing to call Cooper to testify regarding
4 Lara's and Lozano's statements exculpating Petitioner, see id. at 20; (4) failing
5 to move to suppress Lozano's identification of Petitioner at a live lineup in the
6 absence of counsel, see id. at 21-22; (5) failing to obtain GPS evidence to
7 ascertain Petitioner's whereabouts during the commission of the crime, see id.
8 at 20-21; (6) failing to object to testimony regarding Petitioner's invocation of
9 his right to silence and to the trial court's improper admonition to the jury
10 regarding Petitioner's silence, see id. at 22-24; and (7) his continuing course of
11 ineffective representation. The petition also alleged that Petitioner is entitled to
12 an evidentiary hearing on the issue of ineffective assistance of counsel and that
13 the cumulative effect of his trial counsel's errors deprived him of a fair trial
14 under Strickland. See id. at 3, 27-29. With exception to Petitioner's request for
15 an evidentiary hearing, the contentions in his California Supreme Court
16 petition correspond to those raised in the instant Petition, and all were
17 supported by clearly alleged facts and citations to legal authorities. Even
18 without attachment of supporting exhibits, see Motion at 17, the California
19 Supreme Court was thoroughly apprised of the substance of Petitioner's
20 claims. See Kim, 799 F.2d at 1320. Thus, Petitioner's ineffective assistance of
21 trial counsel claim was fairly presented.

22 **B. Ineffective Assistance of Appellate Counsel**

23 Petitioner's ineffective assistance of appellate counsel claim submitted to
24 the California Supreme Court was also particular enough to satisfy the fair
25 presentation requirement. Petitioner alleged that the factual basis for this claim
26 was his appellate counsel's failure to discover, investigate, and present the
27 errors committed by Petitioner's trial counsel—e.g., those errors alleged in
28 Section III(A), supra. See LD 10 at 30. As Petitioner's ineffective assistance of

1 appellate counsel claim was wholly based on counsel's failure to discover the
2 alleged ineffective assistance of Petitioner's trial counsel, Petitioner's
3 ineffective assistance of appellate counsel claim was pled with as much
4 particularity as was practicable without necessitating a rehashing of
5 Petitioner's ineffective assistance of trial counsel arguments. Thus, these
6 allegations were sufficient to put the state court on notice of Petitioner's
7 ineffective assistance of appellate counsel claims. See Kim, 799 F.2d at 1320.

8 **C. Newly Discovered Evidence**

9 In his petition to the California Supreme Court, Petitioner alleges that
10 newly discovered evidence exonerates him under Herrera v. Collins, 506 U.S.
11 390, 417 (1993). See LD 10 at 10. Specifically, Petitioner describes that another
12 individual, Victor Perez, fits the description of the suspect in the March 17,
13 2010, police report and that Perez bragged to a third party about being the
14 person "who shot and killed a White Fence gang member." Id. Petitioner
15 further contends that this new evidence is consistent with other newly
16 discovered allegedly exculpatory evidence, e.g., Lara's statements to
17 Petitioner's investigator. See id. at 11-12. These factual and legal allegations
18 are consistent with those alleged in the Petition. The California Supreme Court
19 was made aware of the facts alleged and claims brought in this action and had
20 a chance to pass on the claims.

21 Moreover, Petitioner's newly discovered evidence claim submitted to the
22 California Supreme Court was particular enough to satisfy the fair presentation
23 requirement. The California Supreme Court had notice of the factual bases for
24 his claim, the cited legal authorities, and the ultimate remedy sought.
25 Notwithstanding Respondent's correct observation that Petitioner failed to
26 attach the relevant exhibits in support of his petition to the California Supreme
27 Court, the state court petition itself sufficed to "reveal the substance" of
28 Petitioner's claims to the state courts. Kim, 799 F.2d at 1320. Thus, Petitioner


1 is not required to return to the California Supreme Court on this claim.

2 **IV.**

3 **CONCLUSION**

4 IT THEREFORE IS RECOMMENDED that the District Judge issue
5 an Order: (1) accepting this Report and Recommendation; (2) denying
6 Respondent's Motion to Dismiss; (3) ordering Respondent to answer the
7 Petition within thirty-five (35) days of this order; and (4) ordering Petitioner to
8 file any reply or traverse thereto within twenty-one (21) days of service of
9 Respondent's Answer.

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11 Dated: January 30, 2018

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15 DOUGLAS F. McCORMICK
16 United States Magistrate Judge
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